IN THE SUPREME COUNTY OF MISSOURI

DEANNA MARIE COPELAND,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC94804**
	)	
LUCAS WICKS,	)	
	)	
Respondent.	)	

ON TRANSFER FROM THE MISSOURI DOURT OF APPEALS,
EASTERN DISTRICT
APPEAL NO ED101012
ON APPEAL FROM THE CIRCUIT COURT OF LINCOLN COUNTY MISSOURI
FORTY-FIFTH (45TH) JUDICIAL CIRCUIT
DIVISION 1
THE HONORABLE DAVID ASH
CAUSE NO. 10L6-CC00051

APPELLANT SUBSTITUTE BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ..... iii, iv

JURISDICTIONAL STATEMENT..... 1

STATEMENT OF FACTS 1

POINTS RELIED ON..... 8, 9

I. **The trial court erred in granting Defendant's Motion for Summary Judgment because it failed to properly apply the appropriate standard of review for summary judgment in that the trial court did not view the evidence and all reasonable inferences there from in the light most favorable to the non-movant and when so viewed the evidence and reasonable inferences therefrom would not support granting any immunity to Respondent.**

II. **The trial court erred in granting Defendant's Motion for Summary Judgment because the trial court used the improper standard for qualified immunity under the facts**

of this case in that the trial court applied the law as though Respondent were performing the function of an arresting officer rather than the function of a complaining witness and, when analyzed in accordance with case law regarding a complaining witness, Respondent is not entitled to any immunity.

III. The trial court erred in granting Defendant's Motion for Summary Judgment because it made a factual determination of probable cause properly reserved for the jury in that the existence of probable cause is a jury question under the facts of this case.

ARGUMENT 10

CONCLUSION 44

TABLE OF AUTHORITIES

CASES **PAGE**

42 USC § 1983.....1

Albright v. Oliver, 510 U.S. 266 (1994).....26

Bagby v. Brondhaver, 98 F3d 1096 (8th Cir. 1996).....15-18,27

Burke v. Beene, 948 F2d 489 (8th Cir. 1991).....9-10,18-19,45

Davis v. Lambert – St. Louis International Airport,..... 29,36

193 S.W. 3d 760 (Mo. 2006)

Devenpeck v. Alford, 543 U.S. 146 (2004).....14,15,16

Diehl v. Fred Weber, Inc., 309 (Mo. App. E.D. 2010)..... 34,47

Franks v. Delaware, 438 U.S. 154 (1978).....*16*,18,19,23,27

Harlow v. Fitzgerald, 457 US 800 (1982).....13

Haswell v. Liberty Mut. Ins. Co., 557 S.W.2d 628..... 9,10,31-34

(Mo banc 1977)

Hughes v. Aetna Ins. Co., 261 S.W. 2d 942 (Mo. 1953).....32

ITT Commercial Fin. Corp. v. Mid America Marine.....8-10

Supply Corp., 854 S.W. 2d 371. (Mo banc 1993)

Mo Constitution Art V § 10.....1

Kalina v. Fletcher, 552 US 118 (1997).....9,30,43,47

McAnarney v. Commonwealth Loan Co., 208 S.W. 2d 480.....32

(Mo App. 1948)

Malley v. Briggs, 475 U.S. 535 (1986).....21

State ex rel. Twiehaus v. Adolf, 706 S.W. 2d 443.....30

(Mo banc 1986)

State v. Letica, 356 S.W. 3d 157 (Mo banc 2011)..... 37

United States v. Leon, 468 U.S. 897 (1984).....17

Wilcox v. Gilmore, 8 S.W.2d 961 (Mo 1928).....31, 32

MO. CONSTITUTION **PAGE**

Article V, Section 10.....1

US CONSTITUTION

Fourth Amendment.....19

STATUTE **PAGE**

42 U.S.C. § 1983.....1

MERRIAM-WEBSTER DICTIONARY

Heave Definition.....23,24

IN THE SUPREME COURT OF MISSOURI

DEANNA MARIE COPELAND,	)	
	)	
Appellant,	)	
	)	
vs.	)	Appeal No.
	)	
LUCAS WICKS,	)	
	)	
Respondent.	)	

JURISDICTIONAL STATEMENT

Appellant, Deanna Copeland, appeals the trial court's granting of Respondent Lucas Wicks' Motion for Summary Judgment in her action for damages due to the Respondent's malicious prosecution of Ms. Copeland and the violation of her Constitutional rights in violation of 42 U.S.C. § 1983, in the Lincoln County Circuit Court, Forty-Fifth (45th) Judicial Circuit, the Honorable David Ash presiding. This appeal has been transferred to the Supreme Court of Missouri by the Missouri Court of Appeals for the Eastern District of Missouri pursuant to Missouri Supreme Court Rule 83.02 and jurisdiction of the Supreme Court of Missouri is authorized under Art. V § 10.

STATEMENT OF FACTS

On or about May 15, 2006, Appellant left her two-year-old daughter,

L.C., in a playpen under the supervision of her then live-in boyfriend, Tony Killian. Legal File (hereafter, LF) p. 49 (Ex. p. 9-10). When she returned to her home from work at approximately 4:30 the next morning, she found L.C. alone in a bathroom with the door shut behind her. *Id.* Appellant picked up her daughter and took her to the full bath at the other end of the home to give her a bath because she was dirty. *Id.* (Ex. p. 12). Shortly after giving her a bath, Appellant noticed some new injuries on her daughter along with what she believed to be an old injury sustained at daycare. *Id.* p. 50 (Ex. p. 14-15).

On May 19, 2006, Respondent, Lucas Wicks, then a detective with the Lincoln County Sheriff's Department, began investigating an allegation that Appellant's daughter, L.C., had been the victim of ***child abuse***. *Id.* p. 61-62. As part of Respondent's investigation, he went to Appellant's residence to speak with the two adult residents of that home: Appellant and Tony Killian. *Id.* At the outset of his investigation, Respondent considered Tony Killian his primary suspect because Division of Family Services (hereafter "DFS") had informed him that they suspected Mr. Killian had injured the child after interviewing both Mr. Killian and Ms. Copeland and because of prior allegations of child abuse against Mr. Killian. LF p. 103-04 (Ex p. 20 ln 6 – p. 22 ln.16). Upon arrival at the home, Respondent observed Tony Killian in front of the house on the phone. LF p. 62. When Respondent approached

him, Mr. Killian attempted to walk away from Respondent and informed Respondent that he (Mr. Killian) was calling his attorney. LF p. 62. After Respondent refused to allow Mr. Killian to leave, Mr. Killian attempted to flee and had to be forcibly restrained. *Id.* Such behavior reinforced Respondent's belief that Mr. Killian was responsible for L.C.'s injuries. LF p. 107 (Ex. p. 29 ln 1-5). Mr. Killian was then questioned by Respondent's partner despite Mr. Killian's at least arguable attempt to refuse to speak to them and to obtain the advice of counsel. LF. p. 62.

Respondent and his partner eventually took both Mr. Killian and Appellant to the Lincoln County Sheriff's Department for further questioning. Respondent still did not suspect that Appellant had abused her daughter. LF p. 111 (Ex. p. 39 ln 6-22). Prior to taking her to the Sheriff's Department for further questioning, Respondent formed the opinion that Appellant was of below-average intelligence. LF p. 121 (Ex. p. 64 ln 15-23). Respondent also observed that Appellant appeared to provide different answers to questions in an attempt to please the questioner. LF p. 121 (Ex. p. 65 ln 14-17). After briefly speaking with Appellant at the Sheriff's Department (see LF p. 47-51), Respondent consulted with another detective who had been questioning Tony Killian. LF p. 113 (Ex. p. 44 ln 8 – 21). Respondent was informed that Tony Killian was being deceptive, telling

inconsistent stories, and attempting to make himself look better. LF p. 114 (Ex. p. 46 ln 25 – p. 48 ln 11). At that point, Respondent and the other detective decided to focus the investigation on Appellant. LF p. 113 (Ex. p. 44 ln 25 – p. 45 ln 8). Respondent has offered no clear reason why the focus of the investigation switched from the primary suspect, Tony Killian, to Appellant. See LF p. 64 and p. 113-115.

During her interrogation, Appellant repeatedly and continuously denied injuring her child intentionally. LF p. 46-60, generally. Respondent and his partner continued to insist that Appellant provide some sort of explanation for her child's injuries. See e.g., LF p. 57-59. In an attempt to extract a confession of intentional violence against her daughter, Respondent and his partner used harsh and vulgar language (See e.g., LF p. 57-58 (Ex. p. 44 ln 25 – p. 45 ln. 1)), repeatedly lied to Appellant (LF p. 117-118 (Ex. p. 56-58)), attempted to "minimize" the alleged abuse (LF p. 117 (ex. p. 54-55)), made thinly veiled promises of leniency if she were to confess to intentionally injuring her child and made thinly veiled threats of worse treatment if she did not (See, e.g., LF p. 57-58 (Ex. p. 44-46)). Respondent and his partner also played "good cop/bad cop" (LF p. 118-119 (Ex. p. 59-60)); and set arbitrary deadlines for her confession (*Id.*), among other tactics and statements designed to pressure Appellant into confessing to

intentionally injuring her child.

In response to the demands for an explanation for the child's injuries, eventually Appellant stated: "since the bruise was all up in here on her eye, it looked consistent to the door knob on the doors to the bathroom." LF p. 58 (p. 46-47 of exhibit). Respondent admits that he understood that comment and other, similar comments regarding how the child's eye may have been injured as hypothetical attempts to explain how the injury may have occurred. LF. p. 119 (Ex. p. 60-61). In his probable cause statement, Respondent swore under penalty of law that "Deanna stated she slammed L.C.'s head into the doorknob due to anger." LF p. 43.

When Respondent and his partner pressed Appellant further for an explanation for the injuries found on her child's mouth, Appellant eventually told Respondent, "I was tired. Yes. I undressed her. I put her in the tub and she wasn't sturdy or steady. She slipped and fell and hit her face on the tub." LF p. 60 (exhibit p. 53). Appellant had previously described the accident causing the injury to L.C.'s mouth as

> I grabbed her underneath her arms. I was sitting on the floor and I grabbed her, and I heaved her over, and the bath water was running, it was very slippery in there, I guess she was --- she wasn't sturdy enough when I let her go. And when I let her go, she slipped and fell.

LF p. 59 (Ex. p. 52 ln 6-11).

Previously, Appellant was explicitly asked and explicitly denied having simply "thrown" her daughter into the tub or having simply "heaved" her so hard that she came loose. LF p. 59 (exhibit p. 51 ln 4-20). Respondent swore under penalty of law in his probable cause statement that "Deanna stated she threw L.C. into the bathtub causing severe bruising and swelling to L.C.'s lip." *Id.*

Based on Respondent's probable cause statement and photos of the child's injuries[1], the prosecuting attorney charged Appellant with child abuse by "knowingly" inflicting "cruel and inhuman punishment" on L.C. LF. p. 45 and p. 122-23 (Ex. p. 68-71). The Honorable Bennett Burkemper

[1] The Appellate Court describes these photos as depicting "severe" bruising. The only remaining copies of the relevant photos are the black and white copies of copies that appear in the record. Very little can be discerned from these copies of the photographs. Appellant believes the Appellate Court may have inappropriately relied on Respondent's description of the photographs during the interrogation. The scope of the injuries to the child is one of several matters that Respondent has admitted he exaggerated or lied about to Appellant during her interrogation. (LF p. 117-118 (Ex. p. 56-58)).

then issued an arrest warrant on that charge with a $50,000 cash-only bond. *Id.*

At the time of this investigation, Respondent was aware that his department used a system called "star-track," which he describes as "an accountability and reporting system to monitor traffic stops, investigations, things of that nature, the outcome of investigations." LF p. 127-128 (Ex. p. 81-83). According to Respondent's understanding, the system would track statistics such as cases closed, arrests, and convictions. *Id.* Ultimately, Respondent admits that he is unaware if or to what extent the program was used in promotional or salary determinations because he had never been a part of the promotional process in the Lincoln County Sheriff's Department. LF p. 128. Respondent later agreed that at some point an officer would be judged negatively if his "statistics" were sufficiently substandard and that such insufficient performance could affect an officer's employment. *Id.* Respondent, at the time of this investigation, was a newly made detective who had been promoted quickly within the department. LF p. 102. Respondent acknowledges that, as he would be promoted, he would also be paid more money. LF p. 127.

At no point has the Respondent admitted that it is even possible to understand what Ms. Copeland actually said and what he claimed she said in

his probable cause statement as anything but having substantially the same meaning. LF p. 127 (Ex. p. 80 ln 15 – p. 81 ln. 3). Respondent has testified repeatedly to that effect, both in the underlying criminal case and in the current case before the court. LF p. 124-125 (Ex. p. 74 ln 1-25) and LF p. 64.

POINTS RELIED ON[2]

I.

The trial court erred in granting Defendant's Motion for Summary Judgment because it failed to properly apply the appropriate standard of review for summary judgment in that the trial court did not view the evidence and all reasonable inferences there from in the light most favorable to the non-movant and when so viewed the evidence and reasonable inferences therefrom would not support granting any immunity to Respondent.

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[2] The Appellate Court expressed the belief that "at least two" of Appellant's points relied on failed to satisfy Rule 84.04(d)(1). Therefore Appellant has slightly modified the points relied on in an attempt to more fully satisfy the requirements of that rule. The substance of the points relied on remains unchanged.

ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371 (Mo banc 1993).

Burk v. Beene, 948 F.2d 489, 494 (8 Cir. 1991).

II.

The trial court erred in granting Defendant's Motion for Summary Judgment because the trial court used the improper standard for qualified immunity under the facts of this case in that the trial court applied the law as though Respondent were performing the function of an arresting officer rather than the function of a complaining witness and, when analyzed in accordance with case law regarding a complaining witness, Respondent is not entitled to any immunity.

Burk v. Beene, 948 F.2d 489, 494 (8 Cir. 1991).

Kalina v. Fletcher, 522 U.S. 118 (1997).

III.

The trial court erred in granting Defendant's Motion for Summary Judgment because it made a factual determination of probable cause properly reserved for the jury in that the existence of probable cause is a jury question under the facts of this case.

Haswell v. Liberty Mut. Ins. Co., 557 S.W.2d 628 (Mo. banc 1977).

Burk v. Beene, 948 F.2d 489 (8 Cir. 1991).

ARGUMENT

A. Standard of Review

Summary judgment is appropriate in cases where the movant can establish that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 378 (Mo banc 1993). The burden at summary judgment for movant is to show a right to judgment flowing from facts about which there is no genuine dispute. *Id.* The key to summary judgment is the undisputed right to judgment as a matter of law; *not simply the absence of a fact question*. *Id.* at 380 (emphasis added). All evidence and reasonable inferences there from are to be viewed in the light most favorable to the non-movant. *Id.* at 382. Because summary judgment can only be awarded where the undisputed facts demonstrate a right to judgment as a matter of law, appellate courts review lower courts' rulings de novo. *Id.* at 376.

Appellant believes that this Standard of review was initially violated by the trial court and that the Appellate Court has made similar errors. Namely,

both the trial court and the Appellate Court found a mere "semantic" difference between Appellant's statement about how L.C. incurred her injury and what Respondent wrote in his probable cause statement. The Appellate Court, unlike the trial court, acknowledges that the first statement at issue in this case, regarding the hypothetical manner of injury to the child's eye exhibited a reckless disregard for the truth. As to the second statement at issue in this case, when viewed in the light most favorable to Appellant, a reasonable person could (and should) conclude the two statements have radically different meanings. We throw baseballs and footballs, not children.

Appellant also asserts that the Appellate Court, like the trial court, has failed to appropriately apply the standard of review to the information provided in support of probable cause outside of the probable cause statement. The trial court claimed that Respondent was entitled to immunity, in part, because he provided a recording of the interview along with his probable cause statement. That holding was contrary to the record. The Appellate Court has cited the "severe" bruising depicted in the photographs that were submitted along with the probable cause statement as helping to establish probable cause. Such pictures, as they appear in the record (which are the only copies that still exist), are insufficient when viewed in the light

most favorable to Appellant to aid in a probable cause determination or any other factual determination. LF at p. 42.

Finally, to the extent the trial and Appellate Courts have determined that probable cause existed to believe Appellant had committed any crime based on any potential test, Appellant believes any such determination can only result from a failure to view the evidence in the light most favorable to Appellant. For example, the Appellate Court cites the fact that L.C. was developmentally delayed as a factor supporting probable cause of Appellant's supposed criminal negligence in allowing L.C. to slip and fall in a wet tub.[3] When viewed in the light most favorable to Appellant and Appellant's claims, Appellant believes this fact and others cited by the Appellate Court, if it were to be properly at issue, actually tends to negate probable cause of any crime in that it is far more likely that a developmentally delayed child, still learning how to stand on her own, would fall and injure herself without any criminal negligence on the part of a parent. Similarly, the fact that a doctor had opined that the injuries were non-

[3] Of course, as will be explained below, this fact has no relevance to any analysis of Appellant's § 1983 claim and essentially no relevance to Plaintiff's malicious prosecution claim (because it has nothing to do with whether or not Appellant abused her child).

accidental, if properly at issue and viewed in the light most favorable to Appellant's claims, does little than reaffirm the prevailing conclusion a reasonable officer would draw from the information available to Respondent: that Tony Killian had abused the child and not Appellant.

B. The Federal Test For Qualified Immunity

The Appellate Court's opinion, although thorough and thoughtful, appears to mistakenly mix the appropriate legal test for the determination of § 1983 immunity as applied to this case (a warrant obtained with intentionally or recklessly false information) with the distinct and separate legal test for immunity when courts are presented with a § 1983 suit based on an allegedly unreasonable seizure *without a warrant*. A careful reading of existing case law makes it clear that the two situations have two distinct and separate tests due to the nature of the Fourth Amendment violations alleged in each as well as the basic nature of qualified immunity.

As with any federal immunity analysis, regardless of the constitutional violation alleged, the court is to determine if the allegations amount to a violation of a constitutional right and whether or not such claimed constitutional right was firmly established at the time of the alleged violation. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Neither

Respondent nor any court reviewing this case has explicitly claimed that Appellant's § 1983 action fails either of those tests. In other words, the basic or "initial" immunity analysis that sets the broad guidelines for immunity from a § 1983 suit appears to be easily satisfied by Appellant's § 1983 claim, which would result in the Respondent being subject to suit.

The confusion in this case arises from federal law's apparent "next step" approach in immunity analysis regarding certain kinds of claimed Fourth Amendment violations. In cases involving the allegation of an *unreasonable arrest without a warrant*, federal law grants immunity to an officer if, under all the circumstances known to the officer at the time, he had probable cause to believe the arrestee had committed any crime, regardless of the officer's stated reason for the arrest.[4] *Devenpeck v. Alford*,

[4] To the extent the Appellate Court and the Respondent refer to the doctrine of "arguable probable cause," it is certainly true that an officer need only "arguable" probable cause to be granted immunity from a suit based on warrantless arrest. Appellant does not believe the case law is clear whether actual probable cause or merely "arguable probable cause" is needed for some lesser offense in a warrantless arrest situation. Regardless, the "arguable probable cause" standard applies to warrantless arrest situations and is irrelevant to this case.

543 U.S. 146, 153-54 (2004). In cases involving the allegation that a person was unreasonably arrested pursuant to a warrant that was obtained by false or misleading information, federal courts "correct the affidavit." If the "corrected affidavit" still establishes probable cause, then the officer is entitled to qualified immunity. *Bagby v. Brondhaver*, 98 F.3d 1096, 1098 (8th Cir. 1996). These tests are separate and distinct and are necessarily so because of the different nature of the Fourth Amendment violation alleged in each scenario.

The fact that the "next step" analysis in each scenario is a separate and distinct test should not be surprising. Although rarely articulated precisely in the relevant case law, these "next step" analyses are not a "next step" at all. Rather, they are required in order to determine if the allegation has established "a constitutional violation," which is the first prong of the "basic test" for qualified immunity. Put another way, each "next step" analysis simply mirrors the contours of Fourth Amendment jurisprudence regarding whether or not the Fourth Amendment has been violated at all. Under Forth Amendment law, an officer's warrantless arrest is only deemed to be "unreasonable" if, under all the circumstances known to him at the time of arrest, he lacked probable cause of any crime, not merely of the one he claimed as the reason for the arrest. See *Devenpeck*, 543 U.S. at 153-54 and

the Fourth Amendment cases cited therein. In other words, if the facts known to the officer created probable cause of any crime, no Fourth Amendment violation has occurred at all because the *warrantless arrest was objectively reasonable. Id.*

By contrast, under Fourth Amendment law, causing a person to be seized by filing an affidavit containing intentionally or recklessly false information is inherently unreasonable. See *Bagby*, 98 F.3d at 1098 ("A warrant based upon an affidavit containing 'deliberate falsehood' or 'reckless disregard for the truth' violates the Fourth Amendment."). The only question remaining in the Fourth Amendment analysis is whether or not that intentionally or recklessly false information in the warrant application was material to the creation of probable cause by the affidavit. See *Id.*; *Franks v. Delaware*, 438 U.S. 154, 171 (1978) ("[I]f, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content *in the warrant* affidavit to support a finding of probable cause, no hearing is required.") (emphasis added). If a "corrected affidavit" establishes probable cause, then the Fourth Amendment has not been violated and the officer is entitled to immunity from suit. See *Bagby*, 98 F.3d at 1098. If a "corrected affidavit" fails to establish probable cause, then the Fourth Amendment has been violated and the officer is subject to

suit. *Id.*; See also, *United States v. Leon*, 468 U.S. 897, 923 (1984) ("Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth."). Here, a corrected affidavit fails to establish probable cause of any crime at all.

C. The Appellate Court Incorrectly Mixed the Two Tests

In applying a mixture of these two different tests, the Court of Appeals has departed from existing law and reached a strange and erroneous conclusion. Rather than simply correcting the affidavit so that the intentionally or recklessly false statements are either absent or are made true, the Appellate Court has "corrected the affidavit" and then attempted to look at all additional facts and circumstances known to the officer. Essentially every fact cited by the Appellate court in its conclusion that probable cause existed so as to warrant the application of qualified immunity to Appellant's § 1983 claim cannot be found in the probable cause statement or in a

corrected probable cause statement.[5] Case law does not warrant such a venture beyond the confines of the four corners of the corrected affidavit.

Next, the Appellate Court proceeds to graft language from warrantless arrest cases regarding the existence of probable cause for any crime onto the "corrected affidavit" test. Appellant is not aware of any case law that directly addresses whether a "corrected affidavit" that would establish probable cause only to arrest a suspect for a lesser offense is a violation of the Fourth Amendment or not. As discussed above, however, Fourth Amendment jurisprudence would appear to hold that the submission of a recklessly false affidavit that materially affects the probable cause determination is inherently unreasonable and a Fourth Amendment violation. See *Bagby*, 98 F.3d at 1098 ("A warrant based upon an affidavit containing "deliberate falsehood" or "reckless disregard for the truth" violates the Fourth Amendment.") (citing *Franks*, 438 U.S. at 171); *Burk*, 948 F.2d at 494 ("if material information in the affidavit was known by her to be false, or if she had no reasonable basis for believing it, then it was not objectively

[5] If the Appellate Court's approach of looking at all information known to the officer at the time is correct, one must wonder what the point of "correcting the affidavit" is. Rather, courts would merely discuss all facts known to the officer and not bother "correcting the affidavit" at all.

reasonable for her to use it to obtain an arrest warrant.") (citing *Franks*, 438 U.S. at 165).

All of the cases cited by the Appellate Court for its approach regarding "probable cause" for any offense are either warrantless arrest cases or cases that directly cite to warrantless arrest cases for such propositions without any analysis. First and foremost, a "corrected affidavit" in this case establishes no probable cause of any crime. But, should this court deem the "corrected affidavit" sufficient to establish a lesser offense as the Appellate Court did, there is no justification for extending the protections of qualified immunity to Respondent. Ultimately, the Fourth Amendment protects citizens from unreasonable search or seizure. U.S. Const. Amend IV. Even if probable cause of a lesser crime exists in a "corrected affidavit," the restrictions on the liberty of the arrestee – that is, the scope of the seizure – is unreasonable based on probable cause for only a lesser offense.

Unlike warrantless arrests where, regardless of the stated reason of the detention, the result to the arrestee is substantially the same. A person arrested pursuant to a felony warrant is almost certainly going to experience unreasonable restrictions on her freedom if there only exists probable cause to believe the she has committed a misdemeanor. Put another way, a suspect

arrested for a felony without a warrant is unlikely to experience a substantially different seizure than if arrested without warrant for a misdemeanor. In either case, the restriction of the suspect's liberty resulting from such a warrantless seizure is essentially identical: the person is arrested and taken to jail to await the issuance of charges as determined by a prosecutor and judge. If charges are not filed within a specified amount of time (there is a minor difference between the length of time one can be held on a misdemeanor and the time one can be held on a felony without a warrant), the suspect must be released. By contrast, very substantial differences exist as to the scope of the seizure that results from being charged with a felony as opposed to a misdemeanor.

For instance, suppose an officer conducts a traffic stop for speeding. Ultimately, he arrests the driver without warrant. While the arrestee is being held, the officer applies for an arrest warrant, submitting an affidavit that states:

1) I witnessed arrestee's vehicle traveling at a high rate of speed;

2) My properly calibrated radar gun indicated the arrestee's vehicle was traveling 80mph in a 55mph zone.

3) During the course of the traffic stop, arrestee confessed to a recent unsolved murder in the area.

Based on that affidavit, the arrestee is charged with murder and held by warrant without bond. Eighteen months later, the officer's conscience gets the better of him and he admits that he had completely and intentionally fabricated the supposed murder confession. Under the approach used by the Appellate Court, that officer would be protected from suit by qualified immunity despite his admitted, knowing, and intentional fabrication of evidence that directly led to an entirely unreasonable seizure and restriction of the arrestee's liberty for the only crime for which probable cause did exist, speeding. Such a result turns any notion of justice on its head and fails to advance qualified immunity's purpose of providing immunity to all "but the plainly incompetent or those that knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The afore-mentioned scenario is not a mere abstract hypothetical result of the Appellate Court's approach. Rather, in this very case, the Appellate Court held that the Respondent recklessly disregarded the truth in his affidavit (which, by definition, no reasonable officer would do), but then held that he is protected by qualified immunity because, in that Court's opinion, a "corrected affidavit" would establish probable cause for a misdemeanor. It is an entirely unreasonable seizure to hold a person for

whom there is only probable cause to believe committed a misdemeanor on a $50,000 cash only bond, as Appellant was in this case. LF. p. 45.

D. Additional Concerns Raised by The Appellate Court

The Appellate Court later argues that it is unfair to hold the Respondent responsible for the offense actually charged by the prosecutor because he does not control the charge the prosecutor decides to file and, moreover, did not recommend a specific charge in his probable cause statement.[6] Without question, the prosecutor determines the specific charge to file. That decision, however, must be made based on the facts presented to her or him in the

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[6] In addition to having no basis in precedent in false affidavit § 1983 cases, this argument is also incongruous with Respondent's clear intention and belief that the Appellant would be charged with "child abuse" and that the crime he was investigating was "child abuse." Not only did Respondent tell Appellant that he had "no doubt" "felony child abuse charges" would be filed against her by the end of the day before she even made the statements at issue in this case, the charging documents mirror his probable cause statement almost verbatim and he personally delivered the charging documents and warrant request to the judge for approval based upon his affidavit. See LF pp. 43; 45; and 57 (ex. p. 44 ln 6-8).

probable cause statement. See *Franks*, 438 U.S. at 165 ("It is established law that a warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter."). Had the officer accurately relayed the facts to the prosecutor and the prosecutor charged the Appellant with a more serious offense than those facts warranted, then the officer would inherently be immune from suit because he did not cause the constitutional violation, the prosecutor did.[7] That is not the case here. Here, the officer's intentional or reckless disregard for the truth led the prosecutor to believe probable cause existed to charge a felony when no such probable cause actually existed. The Appellate Court's concern is unwarranted, unsupported by case law, and should have no role in the qualified immunity analysis regarding Appellant's § 1983 action.

There can be little doubt that the probable cause statement actually written, sworn to, and submitted by Respondent – indicating that Appellant had "admitted" to "slamming" her child's "head into a doorknob out of anger" and then indicating she had confessed that she "threw"[8] the child into

[7] Prosecutors enjoy absolute immunity from suits based on such a situation.

[8] Appellant is greatly confused by the trial and Appellate courts' refusal to acknowledge more than a semantic difference between "throwing a child"

a bathtub "causing severe bruising"[9] - establishes probable cause for a serious felony, including felony child abuse. Certainly, upon reading the

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and "heaving" a child into bathtub, letting go before the child as sturdy and the child slipping and falling in a wet tub. We "throw" baseballs and footballs, we do not "throw" children, particularly into or onto a hard object such as a bathtub. The clear and common sense meaning of "throwing" means to project something through the air. "Heaved," particularly in the context used by Appellant, clearly refers to lifting something heavy. The first listed definition of "heave" reflects such a usage: "to lift or pull (something) with effort." Merriam-Webster Dictionary on-line, A-5. We "heave" children up onto our shoulders or up off the ground to put in their cribs just as we may "heave" but not "throw" a case of wine bottles off the ground onto the counter. The clear distinction was abundantly clear to the interrogating detective who followed up her account by asking her if the truth was that she just "threw the child," or "heaved " her so much the child came loose, both of which Appellant then explicitly denied. LF p. 59 (Ex. p. 51 ln 4-20).

[9] Even if there is somehow only a semantic difference between "heaved" and "threw" in this case, Appellant made clear that the "slip and fall" "caused" the child's injuries, not being "heaved" off the ground into the tub.

probable cause statement submitted in this case, a prosecutor and a neutral magistrate believed so. There is equally little question that, had the officer accurately recounted Appellant's relevant statements, the affidavit would utterly fail to establish probable cause to believe Appellant had committed a felony, if any crime at all. Rather, it would merely establish that a mother "guessed" she let go of her child before the child was sturdy enough and the child slipped and fell in a wet tub. LF p. 59 (Ex. p. 52 ln 8-12).

Again, Appellant believes that a corrected affidavit fails to establish probable cause to believe Appellant committed any crime. But, where an officer's intentionally or recklessly false statements create the apparent existence of probable cause for a far more serious offense than the truth would establish and where the accused's liberty is substantially and unreasonably affected due to the false affidavit, there is no legal or public policy reason to hold the officer immune from suit for the damages he caused. Put more simply, even if a corrected affidavit establishes probable cause for a lesser offense, the scope of the seizure Appellant experienced is far more than she would have experienced or reasonably could have experienced if charged with a misdemeanor. Her seizure would still, therefore, be unreasonable and in violation of the Fourth Amendment. Because her seizure was unreasonable and in violation of the Fourth

Amendment regardless whether a corrected affidavit established no probable cause at all or probable cause only for a lesser offense, Respondent would not entitled to qualified immunity from Appellant's § 1983 suit in either case. The scope of the seizure Appellant experienced (including nearly 30 days in jail, a $50,000 cash bond, near monthly court appearances for nearly two year, and the fear and mental anguish associated with potentially being sent to prison for up to seven years) was wholly unreasonable based on probable cause for a misdemeanor.[10] See *Albright v. Oliver*, 510 U.S. 266, 278 (1994) (Ginsber, J., concurring) (discussing the scope of seizure resultant from a pending felony charge, whether incarcerated or on bond, includes "reputational harm" and "the financial and emotional strain of preparing a defense"). Because Respondent's reckless or intentional

[10] This is not to say that Appellant believes courts are to determine if the scope of the actual seizure is unreasonable for the less serious offense that theoretically could have been charged. Rather, Appellant believes the law to be that the scope of seizure for a more serious offense is inherently unreasonable if for no other reason than the fear and mental anguish associated with the exposure to an increased range of punishment. See *Albright*, 510 U.S. at 278 (Ginsberg, J., concurring).

disregard for the truth directly led to the unreasonable seizure of Appellant, he is not entitled to immunity under federal law.

E. Applying the Appropriate test to this case.

Although Respondent has attempted to do so repeatedly, it is difficult to question that the Respondent's probable cause statement demonstrated an intentional or reckless disregard for the truth. Appellant is unaware of any case that specifically holds that a "corrected affidavit" should contain all facts known to the officer as the Appellate Court appears to hold.[11] Rather, Fourth Amendment law makes it clear that the "corrected affidavit" should only contain the information in the original affidavit but corrected to reflect the truth. *Bagby*, 98 F.3d at 1099 ("[A] warrant may not be collaterally attacked. . .if all the false and reckless portions of a warrant affidavit are corrected and the corrected affidavit still supports a finding of probable cause.") (Citing *Franks*, 438 U.S. at 171-172). In this case, a corrected affidavit would establish only the following material facts:

1) L.C. was found to have unexplained injuries in her mouth and

[11] Nearly every fact cited by the Appellate Court in determining that the "corrected affidavit" would establish probable cause of a misdemeanor is not contained in the Respondent's probable cause statement.

around her left eye.

2) Appellant was her mother.

3) Appellant told investigators that she did not know how the child's eye was injured and guessed that she may have accidentally hit the child's head on a doorknob without realizing it because the injury appeared consistent with that having happened.

4) Appellant stated: "I grabbed her underneath her arms. I was sitting on the floor and I grabbed her, and I heaved her over, and the bath water was running, it was very slippery in there, I guess she was --- she wasn't sturdy enough when I let her go. And when I let her go, she slipped and fell.[12]

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[12] Appellant in no way contends that an officer must quote the statements of a suspect. Rather, in this case – and much to Appellant's dismay – there appears to be a great deal of confusion as to whether "throwing" a child into a tub, causing severe bruising means the same thing as "heaving" in the context used by Appellant. Therefore, Appellant believes Appellant's actual statement should be used for the purposes of this test. Any argument that using her actual words is inappropriate would seem to acknowledge that the "summary" the Respondent provided was materially different than her own words.

A properly "corrected affidavit" that accurately reflects what Appellant actually said regarding how the child was injured would establish only that the she did not know how the eye got injured and that the mouth was injured when Appellant lifted her into the tub with the water running and the child slipped and fell in the wet tub once she let go. A small child slipping and falling under a parent's supervision is hardly probable cause to believe the parent has committed any crime. If that were the case, essentially every parent who has ever routinely given a toddler a bath could be charged with a criminal offense. No matter how careful a parent maybe, on at least one occasion in any child's life – and likely on many occasions – the child will slip and fall in a wet tub. Because a corrected affidavit fails to establish probable cause of any crime, Respondent is not entitled to qualified immunity.

E. The State Test Generally

Under Missouri law, an official is entitled to immunity for his discretionary actions that are merely negligent unless he acted with actual malice. *Davis v. Lambert-St. Louis International Airport*, 193 S.W.3d 760, 763 (Mo. 2006). The Missouri State immunity test is a different test that the federal test for immunity from a § 1983 suit. There is nothing inconsistent

about this fact because, as Justice Scalia has pointed out, a § 1983 suit alleging a constitutional violation resulting from a false affidavit is an entirely different tort than the common law tort of malicious prosecution. *Kalina v. Fletcher*, 522 U.S. 118, 134 (1997) (Scalia, J., concurring). The Appellate Court points to Missouri's denial of immunity to those acting with malice in bad faith as an anomaly given federal law's objective approach to immunity from §1983 suits. In reality, many states have adopted an "actual malice" or "bad faith" exceptions to official immunity and, therefore, also differ from the federal test for immunity from a § 1983 lawsuit. See *State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 443, 446-47 (Mo banc 1986) (citing cases applying Illinois, Colorodo, Georgia, Hawaii, Iowa, Massachusetts, Michigan, Nevada, North Carolina, Ohio, Tennessee, Washington, and Wisconsin law). Although § 1983 case law attempts to graft common law notions of immunity onto the torts created by that statute, common law and § 1983 case law are not interchangeable. Indeed, the various tests and approaches designed by the courts to adapt common law immunity principals to § 1983 torts can lead to conclusions that are the precise opposite of what common law would hold. *Kalina*, 522 U.S. at 131-33 (Scalia, J., concurring).

The fact that, in principal, a defendant could be immune from one tort

but not the other is not an anomalous result because these are two different torts altogether based on different tortious conduct. *Id.* The essential tortious act under a § 1983 suit alleging an officer obtained an arrest warrant through the use of intentionally or recklessly false information in an affidavit is intentionally or recklessly misstating the truth creating a constitutional violation. *Id.* The essential tortious act of the common law tort of malicious prosecution is the instigation of a legal action that lacked probable cause. *Id.* Indeed, the common law tort of malicious prosecution does not require a violation of the Fourth Amendment (or any other constitutional violation) or for the defendant to submit an affidavit, testify, or to cause the "seizure" of anyone. Rather, the tort of malicious prosecution prohibits a person causing the initiation of a criminal or a civil case with malice and without probable cause.

F. Probable Cause In Missouri Malicious Prosecution Law

"Probable cause," as used in this sense is "determined by the same principals" as criminal/Fourth Amendment law "with the necessary changes in points of detail" *Haswell v. Liberty Mut. Ins. Co.*, 557 sw2d 628, 633 (Mo. banc 1977) (quoting *Wilcox v. Gilmore*, 8 S.W.2d 961, 962 (Mo. 1928)). Missouri courts elaborating on the nature of a "probable cause" as

meant in a malicious prosecution case have also said it is "a belief in *the charge or facts alleged* based on sufficient circumstances to reasonably induce such belief in a person of ordinary prudence in the same situation." *Id.* and the cases cited therein (emphasis added). In fact, under Missouri law as it relates to the tort of malicious prosecution, a want of probable cause can even be derived from a defendant's failure to exercise due diligence before the commencement of a lawsuit or criminal case if the exercise of due diligence would have uncovered information that negated probable cause. *Haswell*, 557 S.W.2d at 634 (citing *McAnarney v. Commonwealth Loan Co.*, 208 S.W.2d 480, 486 (Mo. App. 1948) and *Hughes v. Aetna Ins. Co.*, 261 S.W.2d 942, 949-50 (Mo. 1953), among others). Needless to say "probable cause" as it relates the tort of malicious prosecution is not co-extensive or identical to the concept of "probable cause" as it relates to Fourth Amendment law.

This is not merely a definitional quirk or unintended result of Missouri's definition of probable cause in this context. "Probable Cause" as it is used in a criminal case, a § 1983 lawsuit, or other Fourth Amendment jurisprudence refers to specific tests relating to the bounds of the Fourth Amendment and whether or not a search or seizure of a citizen by the government is reasonable. "Probable Cause" as it relates to the common law tort of

malicious prosecution relates to the reasonableness of causing the initiation of a legal action and does not necessarily relate to the Fourth Amendment or to the government at all. Where the heart of the tort is causing the initiation of a specific lawsuit or criminal proceeding without probable cause to do so, it is no surprise that a defendant must have had probable cause to initiate that specific lawsuit or criminal proceeding. *Haswell*, 557 S.W.2d at 633

The Appellate Court agrees that a person who instigates a prosecution must have probable cause to support the specific suit or prosecution they instigated, but argues that this standard is unduly burdensome on Respondent and similarly situated defendants. Specifically, the Appellate Court points out that in criminal prosecutions, the prosecutor rather than the officer or other complaining witness decides what crime to charge. Of course, the same argument could be applied to any defendant of a malicious prosecution case unless he or she had filed a *pro se* lawsuit with malice and without probable cause. Nothing in Missouri jurisprudence or in public policy considerations would indicate that a person who instigates a criminal proceeding or a civil lawsuit should escape liability merely because an attorney technically decides what crime to charge or tort to allege based on what the person instigating the action has told them.

Rather, the Appellate Court's concern that the Respondent does not

decide the crime charged would seem to stem from a concern that an officer could incur liability merely because a prosecutor has chosen a charge for which there is no probable cause. Such a concern is misplaced both because it is not an issue in this case and because such concerns are addressed by the definition of probable cause as applied to malicious prosecution cases. The definition of "probable cause" used by Missouri courts in relation to malicious prosecution cases specifies that it is a reasonable "belief in *the charge* ***or*** *facts alleged*. . ." based on the circumstances as they would appear to a reasonable man. *Haswell*, 557 S.W.2d at 633. So, a malicious prosecution defendant can rely on the affirmative defense that he had a reasonable basis to believe the *facts alleged* rather than the specific charge alleged if he has provided the facts as they would appear to a reasonable man. In other words, an officer does not commit the tort of malicious prosecution if he presents the prosecutor with an affidavit consisting of facts that a reasonable person in the officer's position would believe are true, regardless of what the prosecutor decides to charge. *Diehl v. Fred Weber, Inc.*, 309 S.W.3d 309, 318 (Mo. App. E.D. 2010).

The Appellate Court's concern that the officer does not choose the charge filed by the prosecutor appears to be particularly misplaced in the case at bar. The Appellate Court itself found that the officer's probable cause

statement demonstrated a reckless disregard for the truth and that, without those recklessly false facts, probable cause was lacking to believe Appellant committed any felony. The affidavit the Respondent filed containing recklessly or intentionally false information caused the Appellant to be charged with a felony when she otherwise could not have been because there was no probable cause of such a crime. Appellant was thereby damaged. This is the very essence of a malicious prosecution claim. Respondent cannot claim that his actions are shielded merely because the lawyer he presented recklessly false facts to acted reasonably based on those false facts. It is not only reasonable and foreseeable that a prosecutor would file felony child abuse charges based on the facts contained Respondent's affidavit, it would be appalling if a prosecutor did not do so. There can be no dispute that a mother who admits to slamming her child's head into a doorknob out of anger and then "throwing" that child into a bathtub "causing severe bruising" should be charged with child abuse. The problem is, Appellant said no such things. The statements referred to, when truthfully recounted or summarized establish no probable cause to believe any offense was committed at all. The prosecutor and the judge were not allowed to perform their functions based on facts that were reasonably believed to be true. Instead, they were given intentionally or recklessly false information

and Appellant was thereby damaged. The Appellate Court's concerns on this point are unwarranted.

G. The State Test Applied to This Case

"Official immunity," however, does not turn on a determination of probable cause. A governmental official is immune from suit for his discretionary acts when engaged in his governmental duties so long as the discretionary act was merely negligent and he was not acting with actual malice or bad faith. *Davis v. Lambert-St. Louis International Airport*, 193 S.W.3d 760, 763 (Mo. 2006). It would appear self-evident that the initiation of a prosecution upon facts that demonstrate a reckless disregard for the truth is more than "mere negligence;" it is reckless. Unless this court can say that, when viewing the facts and inferences in the light most favorable to Appellant's claims, Respondent's instigation of the criminal proceedings against Appellant cannot be seen as reckless, Defendant is simply not entitled to official immunity under state law. Because the conduct was reckless, no further analysis is needed.

H. The Malice Exception

The Appellate Court focuses a great deal on an exception to official

immunity: that no governmental official can be immune from suit where their discretionary decision was motivated by malice or bad faith. In Appellant's opinion, this issue need not be reached because the discretionary act in this case was not merely negligent; it was at least reckless when viewed in the light most favorable to Appellant's claims. But, should this court reach this issue, there is more than sufficient evidence *in the record before the court* from which a reasonable juror could conclude that the Respondent acted with malice or in bad faith in the instigation of this prosecution. Specifically, Appellant contends the Respondent acted "maliciously" and with "evil intentions." A reasonable juror could find those allegations supported by the record when all facts and inferences are viewed in the light most favorable to Appellant's claims.

It is axiomatic that "[d]irect proof of the required mental state is seldom available, and such intent is usually inferred from circumstantial evidence." *State v. Letica*, 356 S.W.3d 157, 166 (Mo. banc 2011). In this case, the officer believed Tony Killian was the party most likely to have abused the child. LF. p. 104 (ex p. 21 ln 16- p. 22 ln 16) and p. 107 (Ex. p. 29 ln 1-5). Upon initially making contact with Tony Killian, Mr. Killian attempted to refuse to speak to Respondent and attempted to contact a lawyer. LF. p. 62. In response, Respondent tackled and handcuffed Mr. Killian – creating at

least a close question as to whether such an act was an illegal arrest and whether any statements from Mr. Killian obtained thereby could be used to prosecute him. See LF p. 62. After coming to the belief that Appellant was of "below-average" intelligence and appeared to attempt to please her questioner by adapting her answers to provide the answer she though the questioner was looking for, Respondent and his partner decided to focus their investigation on Appellant. LF p. 121 (Ex. p. 64 ln 15-23; p. 65 ln 14-17). Respondent can offer no reason why the investigation's focus shifted from Mr. Killian other than to say that Appellant had provided some degree of inconsistent stories and there were "unanswered questions." LF p. 64; 113-115. Respondent admits that at the time he shifted his investigations focus onto Appellant, he was aware that his prime suspect, Tony Killian, was also providing inconsistent stories, exhibiting signs of deception and had "unanswered questions." LF p. 113-115 Finally, although Respondent points to Appellant's supposed "inconsistent stories" as a reason to focus his investigation on her, he was admittedly aware that Appellant had allegedly given the "inconsistent stories" long before he decided to focus his investigation on her. He was told that Appellant had given inconsistent accounts of some sort by DFS (LF. p. 108 (Ex. p. 32 ln 22 – p. 33 ln 11)) at the outset of his investigation (LF p. 103 (Ex. p. 20 ln 6-25)). Not only did

he still initially believe Tony Killian was the likely culprit despite that information (LF p. 104), subsequent information he obtained had only strengthened that belief. LF p. 107 (Ex. p. 29 ln 1-5)

A reasonable juror could conclude from these facts that it is more likely true than not that Respondent believed Tony Killian was the most likely offender, but believed he could not make a case against him that would hold up in court. A reasonable juror could also conclude from the facts in the record that it is more likely true than not that Respondent believed closing cases by arrest and obtaining convictions on those cases would help his career and his own monetary gains through career advancement because such measures where tracked in his department by a system called "star track" and were used to review officer performance. See LF p. 127-128. Even the name of the system implies that it "tracks" "star" officers through such statistics as arrests and convictions. A reasonable juror could then conclude from the record that, so motivated, Respondent focused his investigation on Appellant with the purpose of coercing a false confession out of her because he believed she was of below-average intelligence and her answers to questions appeared to be easily manipulated by the questioner.

The manner in which the Respondent and his partner proceeded with the

interrogation also supports such inferences of intentional conduct by a reasonable juror viewing this record. During her interrogation, Appellant repeatedly and continuously denied injuring her child intentionally. LF p. 46-60. Respondent and his partner continued to insist that Appellant provide some sort of explanation for her child's injuries. See e.g., LF p. 57-59. In an attempt to extract a confession of intentional violence against her daughter, Respondent and his partner used harsh and vulgar language (See e.g., LF p. 57-58 (Ex. p. 44 ln 25 – p. 45 ln. 1)), repeatedly lied to Appellant (LF p. 117-118 (Ex. p. 56-58)), attempted to "minimize" the alleged abuse (LF p. 117 (ex. p. 54-55)), made thinly veiled promises of leniency if she were to confess to intentionally injuring her child and made thinly veiled threats of worse treatment if she did not (See, e.g., LF p. 57-58 (Ex. p. 44-46)). Respondent and his partner also played "good cop/bad cop" (LF p. 118-119 (Ex. p. 59-60)); and set arbitrary deadlines for her confession (*Id.*), among other tactics and statements designed to pressure Appellant into confessing to intentionally injuring her child. Respondent does not deny the intention to pressure Appellant to confess to child abuse. See, e.g., LF. p. 117-118. In this case, the extremely coercive nature of the interrogation of a young woman whom the Respondent believed to be of below average intelligence and easily manipulated by her questioner could support such a conclusion,

particularly when combined with the fact that Respondent believed a different person was responsible for the crime before focusing his investigation on Appellant without any meaningful explanation as to the shift in focus onto Appellant.

Finally, after the coercive interrogation succeeded only in obtaining a statement from Appellant that she remembered that one of the injuries the child incurred was the result of an accident in the bathtub where the child slipped and fell, the Respondent submitted a sworn affidavit alleging the Appellant had actually "admitted" to causing both injuries by "slamming the child's head into a doorknob out of anger" and "throwing" the child into the tub. When viewed in the light most favorable to Appellant's claims, including all reasonable inferences, a reasonable juror could conclude it is more likely true than not that such gross and reckless misstatements of fact were, in fact, intentional, so that Respondent could still improve his statistics, and therefore his career prospects, as measured by "star track." Such a conclusion would be further bolstered by Respondent's repeated assertion, both in the Appellant's criminal prosecution and here, that the statements contained in his probable cause statement accurately reflect Appellant's statements to him. LF p. 127 (Ex. p. 80 ln 15 – p. 81 ln. 3); LF p. 124-125 (Ex. p. 74 ln 1-25); and LF p. 64.

As just outlined in brief, the record, when the facts and inferences are viewed in the light most favorable to Appellant's claims, is sufficient to support a reasonable juror's conclusion that it is more likely true than not that Respondent acted with malice and with bad faith, should the court reach this issue.[13]

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[13] Appellant has consistently maintained that this analysis need not be reached and, furthermore, that it has never been put at issue by Respondent. Regardless, Appellant believes the record as it stands is sufficient to defeat summary judgment on this point should the court reach it, but would point out that, in no small part because the issue should not be reached and was never truly put at issue by Respondent, the record could be supplemented with numerous additional facts that would further support such inferences of a lack of probable cause and of bad faith that were technically left out of the record because Appellant's Counsel decided to reserve confronting Respondent with some facts he denied or could not recall in deposition for trial. A few such examples include the facts that: 1) Respondent was aware that L.C.'s older brother had told his father that Tony Killian would hit him; 2) that Respondent was aware Mr. Killian had a lengthy history of criminal activity; 3) that Respondent almost immediately began misrepresenting Appellant's statements made to him to DFS; and 4) that Respondent seized

I. Any Other "Immunity" from Malicious Prosecution is Merely a Motion for Summary Judgment Alleging Insufficient Evidence of one or More Elements

In any sense that some Missouri cases or other cases concerning the common law of malicious prosecution and official immunity refer to "official" or "qualified" immunity from the tort of malicious prosecution at common law, it appears to be generally meant in the sense described by Justice Scalia in saying that there "was a kind of qualified immunity built into the elements of the tort." *Kalina*, 522 U.S. at 133 (Scalia, J., concurring). In the sense that having probable cause or a lack of malice amounts to any kind of "immunity" from a malicious prosecution case, such claimed "immunity" amounts to little more than a motion for summary judgment alleging that the Plaintiff cannot make a submissible case on one

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Appellant without probable cause by demanding that she had no choice in whether or not she came to the station with him, despite his admittedly lacking probable cause to believe she had committed a crime at the time he did so. If this court reaches this issue and has any doubt that the record is sufficient to reach a jury, Appellant requests leave to supplement the record in this regard or a remand for additional evidence.

or more of the required elements. As Appellant has repeatedly pointed out, Respondent has never claimed that he was entitled to summary judgment based on the Appellant's inability to present a submissible case on any element. Instead, Respondent has only ever asserted that he is "immune" from suit under the doctrine of qualified immunity.

To the extent that this court may construe Respondent's summary judgment motion as challenging the ability of the Appellant to make a submissible case on the elements of a want of probable cause and/or malice required for her to prove a malicious prosecution case, Appellant believes the record, when viewed in the light most favorable to her claims, establishes a jury question on each issue. Moreover, Appellant believes that additional facts, not currently in the record, would further support Appellant's positions and that the absence of those facts from the record is the result of Respondent having never clearly alleged that Appellant cannot make a submissible case on any of her elements.

Conclusion

Applying the correct test to each of Appellant's claims demonstrates Respondent is not entitled to either qualified immunity from Appellant's § 1983 lawsuit or official immunity from her malicious prosecution claim.

Although Appellant maintains that the issue has never been properly put before any court by Respondent, the record, when viewed in the light most favorable to Appellant, also sufficiently establishes that Appellant would withstand a motion for summary judgment claiming that she could not prove the elements of a "want of probable cause" or malice relating to her malicious prosecution claim.

As to the § 1983 claim, a "corrected affidavit" establishes no probable cause of any crime. Even if a corrected affidavit were to establish probable cause for a lesser offense, the issuance of a warrant for a greater offense due to the intentionally or recklessly false statements of Respondent inherently causes an increased scope of the eventual seizure and results in a violation of the Fourth Amendment, depriving Respondent of qualified immunity. More to the point, " if material information in the affidavit was known by h[im] to be false, or if [he] had no reasonable basis for believing it, then it was not objectively reasonable for h[im] to use it to obtain an arrest warrant," and he should be subject to suit. *Burk v. Beene*, 948 F.2d 489, 494 (8th Cir. 1991).

As to the application of the doctrine of official immunity, Appellant has alleged and Appellate Court has found reckless conduct on the part of Respondent. Official immunity grants immunity only from allegations or evidence of mere negligence. Additionally, facts exists that would allow for

a reasonable inference that the Respondent acted with malice and in bad faith, which would also deprive him of official immunity protections. The Appellate Court's discussion of "probable cause" as it relates to the malicious prosecution claim actually attempts to address the sufficiency of the Appellant's evidence to prove that element of her claim rather than on any common law immunity. Regardless, the Appellate Court's analysis on this point is correct that Respondent simply lacked probable cause to initiate this prosecution or to allege the facts upon which it was based.

The Appellate Court questions the propriety of the common law and advocates this Court to abandon Missouri common law regarding probable cause in a malicious prosecution case. The Appellate Court requests this Court to determine that a malicious prosecution defendant need only probable cause to instigate any suit or criminal action, regardless of the defendant's actions in instigating the specific action brought, so long as an attorney made the final decision as to what crime to charge or tort/contract breach to allege. To so hold would entirely gut the common law tort of malicious prosecution. Moreover, the Appellate Courts urging on this point ignores that "advice of counsel" is already a firmly established affirmative defense to the tort of malicious prosecution, which allows the Defendant to demonstrate that he provided accurate information to the attorney who then

initiated a court action that was not justified on those facts. *Diehl v. Fred Weber, Inc.*, 309 S.W.3d 309, 318 (Mo. App. E.D. 2010). The Respondent has not pled, and realistically could not maintain, an affirmative defense of "advice of counsel."

Finally, the Appellate Court also requests this Court to hold that "official immunity" should be extended to bad faith actors and that Missouri should adopt a purely objective test to official immunity to mirror § 1983 immunity law. To say that common law immunity should conform to § 1983 immunity law is to let the tail wag the dog. The various doctrines applying immunity standards to § 1983 actions attempt to, as nearly as possible, mimic common law immunity, even though the rules and guidelines established with that intent sometime lead to contrary results. See *Kalina*, 522 U.S. at 131-135 (Scalia, J., concurring). To now hold that the common law should be altered to conform to a test that is designed to mimic the operation of common law when the new test fails to accurately mimic it, is an absurd result and unwarranted by any authority. Indeed, the Supreme Court of the United States appears perfectly comfortable with the notion that immunity standards for § 1983 suits may materially differ from common law immunity. *Kalina*, 522 U.S. at passim. There is no reason for this court to reach the "malice" official immunity issue because the malicious

prosecution claim in this case involves reckless conduct, which is not protected by official immunity. But, to the extent this court may reach that issue, there is absolutely no reason to depart from a century of Missouri common law on the matter.

In no respect is the Respondent entitled to any immunity protections on these facts. No public policy is served by extending any type of immunity to a defendant who has recklessly or intentionally disregarded the truth in a sworn affidavit where such reckless or intentional falsehoods have caused damage to a plaintiff. In this case, Respondent has, at a minimum, acted recklessly and that reckless conduct directly lead to damages sustained by Appellant. Respondent is not immune from suit under any theory or test and Appellant requests this Court reverse the decision of the trial court and remand for jury trial.

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CERTIFICATE OF SERVICE

A copy of the above and foregoing was via electronically filed to: Mr. Joel Brett, Attorney at Law, 211 North Third Street, St. Charles, MO 63301- 2812 on this 17th day of February, 2015.

/s/ John D. James
John D. James